20 November 2020

Mr David Hatfield
Competition Exemptions Branch
Australian Competition and Consumer Commission
GPO Box 3131
Canberra ACT 2601
exemptions@accc.gov.au

Dear Mr Hatfield,

Submission by the Victorian Health Promotion Foundation (VicHealth) on Infant Nutrition Council Limited application for the reauthorisation of the Marketing in Australia of Infant Formula: Manufacturers and Importers Agreement (MAIF Agreement).

VicHealth welcomes the opportunity to comment on the Application made by the Infant Nutrition Council Limited (INC).

VicHealth's position is that the reauthorisation of the MAIF Agreement as proposed by INC should not be granted for the following reasons:

1. Breastfeeding is critical for a healthy start to life. This can be undermined by continued and aggressive marketing of highly profitable breastmilk substitutes.
2. The MAIF Agreement is an insufficient mechanism to support the application of the World Health Organization's International Code of Marketing of Breast Milk Substitutes and subsequent World Health Assembly Resolutions.
3. The MAIF Agreement lacks sufficient sanction and enforcement powers.
4. Australia requires a regulatory environment that promotes breastfeeding for all mothers and babies and protects them from marketing of harmful products.

We have expanded on these concerns in the attached submission.

We are happy for our submission to be made public on the public register on the ACCC website.

We would welcome the opportunity to discuss this submission further. Please contact Cassie Nicholls, Senior Policy Advisor, on [redacted] or [redacted] if you wish to do so.

Yours sincerely,

[redacted]

Dr Sando Demaio
Chief Executive Officer

Submission to the Infant Nutrition Council Limited application for reauthorisation AA1000534-1, *Marketing in Australia of Infant Formula: Manufacturers and Importers Agreement (MAIF Agreement)*

About the Victorian Health Promotion Foundation (VicHealth)
VicHealth was established as a statutory body of the Victorian Government in 1987 and we have over 30 years' experience in promoting health. We know there are barriers to good health and wellbeing for people in our community, and we work with partners to discover, implement and share solutions to these challenges. We understand how changes in the environment can promote health and draw on practices that ensure we achieve the best outcomes for those who need it most.

A core part of our work is ensuring all Victorians can eat a healthy, balanced diet. We know that the availability and ease of access to unhealthy foods, the relatively high cost of healthy foods such as fruit and vegetables, time pressures that make convenience foods appealing, and advertising and social norms are all forces that shape our diet.

We work to support policy reform that promotes healthier eating for all Victorians. This is particularly important for infants, toddlers and children, as an optimal diet in the early years can set them up for a life-long good health.

For more information, see www.vichealth.vic.gov.au

VicHealth's position is that the reauthorisation of The MAIF Agreement as proposed by the Infant Nutrition Council Limited should not be granted for the following reasons:

1. Breastfeeding is critical for a healthy start to life. This can be undermined by continued and aggressive marketing of highly profitable breastmilk substitutes

Nutrition is fundamental for optimal growth during the early years of life.[1] The first 2000 days (0–5 years) are a critical period to reduce obesity inequities and improve health outcomes that manifest over the life course. For this reason, it is an important life stage to focus health promotion efforts to ensure that all Australian children are breastfed where possible, and receive optimal nutrition to live healthy, happy lives.[2]

Breastfeeding is important to the health, nutrition and wellbeing of infants and children, and the health and wellbeing of mothers. Breastfeeding protects against infection, overweight and obesity, and some chronic diseases including type 2 diabetes.[3] [4] Breastfeeding also contributes to improved cognitive development and intelligence.[5] There are also maternal benefits including reduced risk of ovarian and breast cancer,[6] [7] reduced risk of maternal depression,[8] as well as a reduced risk of developing type 2 diabetes.[9]

The National Health and Medical Research Council recommends that infants should be exclusively breastfed up until six months.[10] At six months, infants can begin to be introduced to a variety of wholefoods and can continue to be breastfed until 12 months of age and beyond, for as long as the mother and child desire. At times, due to a range of factors, breastfeeding is not possible. Where breastfeeding is not possible, it is recommended that infants are fed a commercial infant formula (breastmilk substitute) that meets Codex Alimentarius standards.[11] From 12 months of age, infants can begin consuming regular full cream cow's milk.[12]

Exclusive breastfeeding up to six months has been shown to protect against excessive weight gain in early infancy.[13] Excessive and rapid weight gain in infancy has been linked to obesity in later life.[14 15] In Australia, an estimated 25% of children aged 2–17 years are overweight or obese,[16] and there are significant inequities in obesity. Overweight and obesity is more common among Aboriginal and Torres Strait Islander children aged 10–14 (37% compared with 27% in non-Indigenous children),[17] children living in the lowest socioeconomic areas (27% compared with 22% in the highest socioeconomic areas),[18] and children living in regional and remote areas (29% compared with 23% living in major cities).[19]

Despite evidence of the benefits of exclusive and continued breastfeeding for children, women and society, rates in Australia remain sub-optimal. In 2014–15, only 24.7% of children aged 6–24 months had been exclusively breastfed to at least six months of age.[20] Mothers from low socioeconomic backgrounds were less likely to exclusively breastfeed their baby.[21] Only 7% of Aboriginal and Torres Strait Islander babies were exclusively breastfed up to six months of age, compared to 16% of non-Indigenous babies.[22]

A major factor undermining efforts to improve breastfeeding rates in Australia is the continued and aggressive marketing of highly profitable breastmilk substitutes.[23] Breastmilk substitutes include any milks in either liquid or powdered form, that are marketed for infants and young children up to the age of three years. This includes infant, follow-up and toddler formulas.[24 25]

The availability of products within Australia's food environment should promote breastfeeding up to two years and beyond, in line with World Health Organization (WHO) recommendations.[26]

2. The MAIF Agreement is an insufficient mechanism to support the application of the WHO's International Code of Marketing of Breast Milk Substitutes and subsequent World Health Assembly Resolutions

The WHO and UNICEF *Global strategy for infant and young child feeding* calls on governments to protect, promote and support breastfeeding through policy action, including the adoption of the International Code of Marketing of Breast-Milk Substitutes and subsequent World Health Assembly resolutions (the WHO Code) into national legislation.[27]

Globally, 136 countries have implemented legislation to support the WHO Code. However, Australia has not done so, and therefore currently does not adequately meet international standards.

The MAIF Agreement was first authorised in 1992, and nearly three decades later it fails as a framework to regulate the marketing of breastmilk substitutes in a way that best supports the health needs of Australia's infants, toddlers and children.

The MAIF Agreement is a voluntary and industry-led response to the WHO Code.[28] The MAIF Agreement does not align with the commitment that governments of WHO Member States should uphold. In particular, the MAIF Agreement does not align with the following:

- Article 5.1: There should be no advertising or other form of promotion to the general public of products within the scope of this Code.
- Article 5.2: Manufacturers and distributors should not provide, directly or indirectly, to pregnant women, mothers or members of their families, samples of products within the scope of this Code.

- Article 5.3: In conformity with paragraphs 1 and 2 of this Article, there should be no point-of-sale advertising, giving of samples, or any other promotion device to induce sales directly to the consumer at the retail level, such as special displays, discount coupons, premiums, special sales, loss-leaders and tie-in sales, for products within the scope of this Code. This provision should not restrict the establishment of pricing policies and practices intended to provide products at lower prices on a long-term basis.
- Article 5.4: Manufacturers and distributors should not distribute to pregnant women or mothers or infants and young children any gifts of articles or utensils which may promote the use of breast-milk substitutes or bottle-feeding.

The WHO recommends that, because continued breastfeeding up to two years promotes the health of both the mother and the baby, follow-on formula and toddler milks must be considered under the WHO Code. These formulas are often used as a replacement for breastmilk and therefore act as a breastmilk substitute.[29] Therefore, the definition of breastmilk substitutes should include any milks in either liquid or powdered form, that are marketed for infants and young children up to the age of three years. This includes infant, follow-on and toddler formulas.[30] [31]

A key area in which the MAIF Agreement has failed to support the health of Australian infants and children is its lack of adequate regulation of breastmilk substitutes. The MAIF Agreement does not apply to toddler and follow-on milks for children aged 12 months and older. As a result, manufacturers are able to market these products as being 'essential' for healthy toddler growth and development. The commercialisation and commodification of breastmilk substitutes for infants 12 months and over has positioned these products as necessary for optimal nutrition during infancy and early years, a position that is not based on strong evidence and may be detrimental to health.

In recent years, manufacturers of infant formula have diversified and extended their product portfolios to include 'follow-on formulas' and 'toddler milks',[32] despite the WHO reporting that toddler milks are unnecessary for children's health and development.[33]

Toddler milks are ultra-processed foods made from milk proteins, skimmed milk powder and various oils, sweeteners and other additives.[34] [35] A 2019 audit of toddler milks found that there are 32 toddler milk products available in Australia.[36] A nutrient analysis found that these products have nearly twice the amount of carbohydrates and sugar than full fat cow's milk, and nearly as much sugar as the Australian formulation of Fanta soft drink; that is, 7.9 grams of sugar per 100mL.[37] Furthermore, 90% of toddler milks had added sugars (i.e. extrinsic sugars).

Toddler milk products are not recommended as a part of a healthy diet for young children, and concerns have been raised about misleading labelling practices. Food Standards Australia New Zealand (FSANZ) is currently reviewing elements of the Food Standards Code relating to infant formula but have indicated this work will not extend to reviewing the regulation of toddler milks.

Toddler milks are present in the Australian food supply as they meet the requirements for a supplemental product.[38] In practice this means they are only intended to be used in special circumstances and to address certain health conditions, and are not intended for use by the general toddler population. Despite this, in Australia, toddler milks are marketed as being necessary for healthy growth and development during the early years.[39]

A recent audit of toddler milks in Australia found that toddler milks display a range of claims and messages.[40] All toddler milks were adorned with claims and messages, ranging from two to 26 claims. All toddler milks were labelled with unregulated health related claims and messages (e.g. 'no

artificial colours or flavours', 'partially hydrolysed whey protein', 'added probiotics'), while other messages (e.g. 'dental care', 'recipe ideas', and cross-promotion of other products) were found on 81% of milks. Regulated claims were found on 91% of all toddler milks, with nutrition content claims such as 'high levels of vitamins or minerals' being common. General level health claims such as 'zinc for immunity' and 'iron for energy' were identified on 75% of milks. Both regulated and unregulated claims were heavily used, with an average of six unregulated and eight regulated claims per toddler milk product.

The marketing of toddler milks extends the reach of manufacturers because they are associated with infant formula use and therefore often have brand recognition. While the MAIF Agreement prevents manufacturers from marketing infant formula, toddler milks, which share brand identities with infant formula, are advertised freely and are labelled in a way that indicates progression from one product to the next. Recent research suggests consumers fail to distinguish between advertising for infant formula and for toddler milk.[41] In addition, the co-location and numbering system applied to infant and toddler milk products in supermarkets and retail environments is a marketing strategy that implies a 'natural progression' from infant formula to follow-on milks and then to toddler milks.

VicHealth strongly supports health equity and recognises that some population groups face greater barriers to achieving good health and wellbeing. A recent VicHealth and Deakin University study looked at 50 toddler milks targeted at children aged 12 months and over, and found some products cost up to $1.02 per 200mL serve, while regular cow's milk costs just 26 cents a serve. If drank daily, toddler milk would cost a family as much as $23.56 more per month than regular milk. In addition, toddler milk manufacturers are able to use social media influencers and targeted digital advertising to market their products to Australian families (see Figure 1).[42]

Figure 1: Images from social media influencers' posts promoting Aptamil toddler milk on Instagram with the hashtag #essenceofperfection

3. The MAIF Agreement lacks sufficient sanction and enforcement powers

As well as its limitations in regulating toddler and follow-on milks, the MAIF Agreement lacks sufficient sanction and enforcement powers. In the 2019–20 financial year, eight complaints were

resolved, and only one was determined to have breached the MAIF Agreement.[43] The MAIF Agreement is limited in scope and only applies to the 17 companies that manufacturer or import infant formula and are signatory to the MAIF Agreement. There are no enforcement or sanction powers in place for companies that are not signatories to the Agreement.

For example, on 14 January 2020 a complaint was made against The Little Oak Company, which had allegedly posted various infant formula social media marketing material. However, on 27 February 2020, the MAIF Complaints Committee determined that the complaint was out of scope of the MAIF Agreement, as the company was not a signatory to the Agreement at that time.[44]

In addition, the MAIF Agreement does not apply to retailers and distributors, such as supermarkets and pharmacies, where breastmilk substitutes are commonly sold in Australia.[45] In practice, this means that retailers are able to market these products through price promotions and signage. Two complaints were made in the 2019–20 financial year about retailers marketing infant formula, but both were determined to be out of scope of the MAIF Agreement.[46]

4. Australia requires a regulatory environment that promotes breastfeeding for all mothers and babies and protects them from marketing of harmful products

The *Australian National Breastfeeding Strategy: 2019 and Beyond* commits to reviewing the regulatory arrangements for restricting the marketing of breastmilk substitutes in Australia. Given the limitations of the MAIF Agreement outlined above, and the evidence demonstrating that inappropriate marketing of breastmilk substitutes undermines breastfeeding practices, **VicHealth recommends that the MAIF Agreement is not reauthorised for an additional 10 years**.

Instead, to ensure that all Australian infants are breastfed where possible and given the best start to life, VicHealth recommends that Australia adopts and implements legislative and regulatory measures that align with the WHO Code.

This new framework should:

- apply to all 'breastmilk substitutes', which includes any milks in either liquid or powdered form that are marketed for infants and young children up to the age of three years
- ensure that breastmilk substitutes cannot be marketed, including by retailers and on digital platforms
- apply to retailers and distributors (e.g. supermarkets and pharmacies) in addition to manufacturers and importers of breastmilk substitutes.

To complement legislation that restricts the marketing of breastmilk substitutes, other measures including monitoring and effective enforcement will be required to ensure companies comply.[47]

Instead of reauthorising the MAIF Agreement, VicHealth recommends that Australia implements an evidence-based, comprehensive regulatory framework that aligns with the WHO Code and applies to all breastmilk substitutes.

VicHealth would welcome the opportunity to discuss the development of a new framework with the ACCC. Please contact Cassie Nicholls, Senior Policy Advisor, on [redacted] or [redacted] should you wish to do so.

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